United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with affidavit of mailing

74-2561

To be argued by
PROSPER K. PARKERTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2561

ELIAN BOLANOS,
Plaintiff-Appellant,

—*against*—

MAURICE F. KILEY, District Director, Immigration and Naturalization Service, New York District,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

DAVID G. TRAGER,
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BRIEF FOR DEFENDANT-APPELLEE

PRELIMINARY STATEMENT

ELIAN BOLANOS appeals from an order of the United States District Court for the Eastern District of New York (MISHLER, Ch. J.), entered November 19, 1974, which order denied his application for a temporary restraining order prohibiting the defendant, the District Director of the Immigration and Naturalization Service, from deporting him in accordance with an outstanding order of deportation and forfeiting a bond previously posted on appellant's behalf in the amount of $500 following the expiration on November 7, 1974 of appellant's voluntary departure status. Chief Judge Mishler's order and

consequently, appellant's deportation, has been stayed pending this appeal.*

On this appeal, the sole issue is whether the District Court properly refused to interfere with a denial of an indefinite stay of deportation and extension of appellant's voluntary departure status by the defendant District Director. Appellant who has been illegally present in the United States since August, 1973, contends that reversible error was committed because, on the day preceding his last scheduled date to depart, November 7, 1974, he filed a suit alleging a violation of his civil rights by the Commissioner of the New York City Police Department, one of whose members mistakenly arrested him in March of 1974 on robbery charges. Appellant contends that his deportation will therefore deprive him of his alleged constitutional right to stay in the United States and maintain that lawsuit, and another similar suit, throughout their pendency.

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*Appellant's motion for a temporary restraining order, brought on by order to show cause and affidavits filed November 7, 1974 (App. 7a-12a), was filed a day following the filing of appellant's complaint (App. 1a-3a). The matter was argued the same day. On November 19, Chief Judge Mishler's Memorandum of Decision and Order was entered denying the motion (App. 29a-36a). Thereafter, on November 29, Chief Judge Mishler denied a further stay of apellant's deportation (which by then had been extended by the Immigration and Naturalization Service to December 2) suggesting that: "Any further judicial relief must be sought in the Second Circuit Court of Appeals" (App. 50a). Such relief was sought and granted pending the argument of this appeal by Circuit Judges Feinberg and Mulligan and District Judge Bryan (See Order dated December 10, 1974).

STATEMENT OF THE CASE

As stated by the District Court, the material facts of this case are not in dispute (App. 29a-30a). They are as follows:

(1)

On July 22, 1973, under a visa issued for an alien visitor for pleasure, appellant - a Colombian who, apparently was unmarried - entered the United States at Laredo, Texas. Though that visa expired on August 12, 1973, appellant did not leave the United States (App. 14a). In March of 1974, however, as a result of his arrest in Queens County, New York, on charges unrelated to his status as an illegal alien, the Immigration and Naturalization Service ("INS") learned of his whereabouts and issued an order to show cause why he should not be deported.* Thereafter, on April 18, 1974 a hearing was held before a special inquiry officer and it was ordered that appellant be deported pursuant to §241(a)(2) and

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* It appears that on March 6, 1974, appellant was arrested by the New York City Police and charged with robbery in the first degree, assault in the second degree and possession of weapons. He was not indicted, however, and following his incarceration, the charges were dismissed on April 16, 1974. In his Brief (at pp. 11-12) appellant states that: "The arrest was due to a case of mistaken identity." In a suit alleging violation of his civil rights, appellant alleges that had an interpreter been provided at the time of his arrest, it would have "lead to his immediate release" (App. 51a).

§241(a)(9) of the Immigration and Naturalization Act of 1952, 8 U.S.C. §§1251(a)(2), 1251(a)(9). Nevertheless, he was granted a stay of deportation and the privilege of voluntary departure through May 18, 1974, and released on a $500 bond. The deportation order was not appealed. Once again appellant did not depart within the time provided (App. 14a). He did, however, get married on July 26, 1974 and it appears that his wife, a lawful permanent resident, became pregnant shortly after the marriage.

On October 2, appellant still having failed to obey the order of voluntary deportation, INS directed him to report for deportation on October 17, 1974 at 9:00 A.M. Shortly thereafter, he responded by advising INS of his recent marriage, his wife's pregnancy and, finally, that he was preparing to bring suit against the New York City Police Department for its false arrest of him earlier in the year. Thereafter, appellant applied for an indefinite stay of deportation which was denied by INS. Nevertheless, on October 22, appellant was granted a stay of deportation until November 7. He was advised that, upon his departure on that date, his voluntary departure status, which had been granted in April, would be restored nunc pro tunc despite his failure to depart by May 18 (App. 15a).*

*Such a restoration would have preserved a $500 bond which had previously been posted as assurance of appellant's voluntary departure in May.

(2)

Appellant did not depart on November 7. On November 6 he took two simultaneous steps: (1) he filed a civil rights complaint in the United States District Court, Eastern District, against the New York City Police Commissioner (App. 51a); and (2) he filed a complaint in the case at bar seeking to enjoin his deportation essentially on the ground that his right to sue the Police Commissioner would be abrogated if he were deported (App. 1a-3a).

On the following day, the day he was supposed to depart, appellant sought a temporary restraining order, the denial of which has given rise to this appeal (See footnote, supra at p. 2). In his decision denying the motion, Chief Judge Mishler determined initially that the District Court had jurisdiction: "... in a case such as the present one, where plaintiff does not challenge the deportation order, but merely requests a stay, the district courts have jurisdiction" (App. 34a). Judge Mishler, however, upon his review of the facts determined not only that there was no abuse of discretion in denying appellant a stay of deportation but, additionally, that: "Under these circumstances, the Service's refusal to grant plaintiff a further stay was an appropriate response" (App. 35a). Moreover, Judge Mishler determined that the decision of INS was not rendered "abusive or irrational" by reason of the civil rights action initiated by appellant (id.).

ARGUMENT

The Immigration and Naturalization Service properly excercised its discretion in refusing to grant appellant an indefinite stay of deportation.

Appellant contends that he has an absolute constitutional right to be present in the United States in order to prosecute civil law suits arising from his arrest in March of this year. That right, he contends, cannot be fettered by deporting him and, for that reason, the Immigration and Naturalization Service has no discretion to refuse a stay of his deportation. Alternatively, appellant contends, even if there exists such discretion, it was wrongfully excercised in this case.

In the view of the United States, appellant's contentions are without merit. The courts have consistently recognized and upheld the discretionary refusal of INS to stay valid orders of deportation and, in so doing, have implicitly rejected the notion that collateral consequences of deporation impede that discretion. In this case, appellant has been an illegal alien since August of 1973 and the order of eportation in this case is concededly valid. In short, there is nothing in the record of his case or in appellant's conduct to suggest that the denial of the stay of deportation was anything other than, as Chief Judge Mishler remarked, "appropriate" (App. 35a)

(1)

The Immigration and Naturalization Act of 1952, §242(c), 8 U.S.C. §1252(c) vests discretion in the Attorney General to provide for the detention or the conditions of release of an alien after the entry of a final order of deportation. That statute states, in relevant part:

> (c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. [Emphasis supplied]

The authority to grant or deny stays of deportation after entry of a final order of deportation has been delegated to the District Director of the Immigration and Naturalization Service by the Code of Federal Regulations, 8 C.F.R. §234.4, which states in part:

> ... The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate.... Denial of a stay is not appealable.

Although the regulation does not provide for an administrative appeal from a denial of a stay of deportation, a denial of such a stay is cognizable in the district courts. The standard of review, is as the court stated

in Kladis v. Immigration and Naturalization Service, 343 F.2d 513,515, (7th Cir. 1965):

> "[A] stay of deportation, an extension of a stay or any other relief from deportation are actions committed to administrative discretion. They are matters of grace and not of right and will not be set aside by the courts, absent a clear showing of abuse discretion."

The courts have consistently found that denial of a stay of deportation to pursue pending litigation is not an abuse of discretion. Kladis v. Immigration and Naturalization Service, supra; Adame v. Immigration and Naturalization Service, 349 F. Supp. 313,315 (N.D. Ill. 1972). It is a reasonable excercise of discretion for the Immigration and Naturalization Service to deny a stay of deportation to pursue pending litigation in order to avoid dilatory tactics and delays in contravention of the general policy of the immigration laws.

Under the facts of this case the Service had ample grounds to deny appellant's request for an indefinite stay of deportation. He failed to depart voluntarily on August 12, 1973, when his visa expired. When he was apprehended in New York, some seven months following the expiration of his visa, he was given a stay of deportation and extension of voluntary departure status to May 18, 1974. Moreover, in October, after receiving a letter to report for deportation, nearly five months after the expiration of the stay of deportation and extension of voluntary departure status,

he applied for an indefinite stay in order to pursue prospective civil litigation. This consistent failure to depart voluntarily and to violate the immigration laws provided a reasonable basis for the Service's denial of an indefinite stay. In addition, despite his utterly tenuous status, appellant married and fathered a child. However, the Service did grant a second stay of deportation to and including November 7, 1974. Indeed, appellant again failed to depart voluntarily and on the very eve of his deportation filed this action and simultanerously filed the civil action against the New York City Police Department.

The appellant appears to argue that there was an abuse of discretion because in Kladis v. Immigration and Naturalization Service, supra, which found no abuse of discretion in the denial of a stay, the Service had granted four extensions of the voluntary departure date while the appellant had only been granted one voluntary departure date and one extension of it. No authority is cited to support this contention and the cases controvert it. In Fan Wan Keung v. Immigration and Naturalization Service, 434 F.2d 301 (2d Cir. 1970), the court considered the validity of the application of a change in the policy of the Immigration Service from one of liberality in granting nunc pro tunc extensions of expired voluntary departure dates for aliens who had not departed within the initial period allowed to one of refusal to grant such extentions. In upholding the reasonableness of the revised policy the court cited with approval the opinion of the Service in In Re M, 4 I & N Dec.

626, 628 (1952):

> An alien who once was granted voluntary departure and who is found here illegally, does not merit a second chance for such departure in the absence of very strong extenuating circumstances.

Here the appellant was granted what was upheld as reasonably having been denied the plaintiffs in Keung, a second chance for voluntary departure status, on or before November 7, 1974, in an act of administrative largess.

Appellant also contends that, where there is pending civil litigation, the Immigration Service only has discretion where the civil matters are being used for dilatory purposes. It is submitted that this is a totally impractical and unworkable standard. The appellant's complaint against Michael J. Codd, as Police Commissioner, of the New York City Police Department, provides a fair example of the impracticability of the standard. It is a suit for $2,000,000.00 for failure to provide an adequate interpreter to the appellant after his arrest and for failure to adequately investigate the case. No malice or even negligence is alleged in the complaint and it presents a novel cause of action. The innovative claim and the filing of the complaint on the same day as the present action would appear to place the action squarely within appellant's "dilatory purpose" exception, but can it be said with certainty that the action was commenced solely or primarily for dilatory purposes? Similarly, the appellant's complaint against Willie Richardson in the Supreme Court of the State of

New York alleges as part of the damages that he "was brought to the attention of the Immigration and Naturalization Service and as a result is under deportation proceedings...." That an alien's illegal residence in the United States being brougnt to the attention of the authority charged with the responsibility to enforce the immigration laws is a basis for damages is indeed a novel concept. But again, can it be said with certainty that the action was commenced solely or primarily for "dilatory purposes"? Under the appellant's proposed standard the duration of a stay of deportation could be measured only by the ingenuity of the alien's legal counsel. Quite clearly, it is unworkable and, in any event, given appellant's past conduct and the timing of his lawsuits, there is a strong suggestion that they were brought for the sole purpose of delaying his deportation.

(2)

Appellant's contention that his "rights" to maintain his lawsuits forecloses the excercise of the Service's discretion, though ingenious, is frivoulous. Implicitly, it was rejected in Kladis v. Immigration and Naturalization Service, supra, where the alien sought an indefinite extention of time in which to pursue a claim in workmens compensation. And, though Kladis may have been somewhat more dilatory than appellant has been, that distinction can hardly be the basis upon which appellant's constitutional argument should find a rational setting. As Judge Hand stated for this Court in Kaloudis v. Shaughnessy, 180 F.2d 489, 490-491 (2d Cir. 1950), in expressing the boundaries of the protection afforded aliens by the Fifth Amendment:

> ...[A]ny "legally protected interest" he ever had has been forfeited by "due process of law"; forfeited as completely as a conviction of crime forfeits the liberty of the accused, be he citizen or alien. The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless . . . it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant. It is by no means true that "due process of law" inevitably involves an eventual resort to courts, no matter what may be the interest at stake; not every governmental action is subject to review by judges.
>
> Order affirmed. Kaloudis v. Shaughnessy,

180 F.2d 489, 490-91 (2d Cir. 1950).*

In any event, the deportation of the appellant would not legally prevent him from maintaining his civil litigation. It would only preclude his physical presence in the United States, until such time as he might lawfully re-enter the country. The appellant contends that his presence is "absolutely necessary" to prosecute his civil action because his physical appearance would be necessary to demonstrate the dissimilarity with that of the alleged perpertrator. However, there is nothing legally to prevent the appellant from seeking an order for a video-taped deposition in the action, at which he could be fully examined and cross-examined. The appellant also contends that his presence is necessary to go over transcripts of depositions and to prepare for trial. No doubt it would be more convenient for him to remain in the United States during the preparation of his suit, but such matters of convenience or privilege, do not ascend to the level of property rights protected by the Fifth Amendment.

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*With regard to the analogous Presidential power to pardon, See Shick v. Reed, _____ U.S. _____ 43 U.S.L.W. 4083 (Dec. 23, 1974).

CONCLUSION

The order of the District Court should be affirmed.

Dated: January 7, 1975

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 9th day of January, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE DEFENDANT-APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Belovin & Fleishman, Esqs.
97-18 Roosevelt Avenue
Corona, New York 11368

Sworn to before me this
9th day of January, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 19[illegible]

Lydia Fernandez

LYDIA FERNANDEZ

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19__, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19__

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly **entered** herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19__

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

_____

—Against—

_____

_____

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
_____ is hereby admitted.

Dated: _____, 19__

_____

Attorney for _____

FPI-LC-5M-8-73-7355